

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

**RECEIVED**

OCT 11 2000

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of	)	
	)	MM Docket No. 99-339
Implementation of Video Description	)	
of Video Programming	)	

**PETITION FOR CLARIFICATION OR PARTIAL RECONSIDERATION**

Home Box Office ("HBO"), a Division of Time Warner Entertainment Company, L.P., by its attorneys and pursuant to Section 1.429 of the Commission's Rules,<sup>1/</sup> hereby files this Petition for Clarification or Partial Reconsideration of the Report and Order ("*Video Description Order*," or "*Order*")<sup>2/</sup> in the above-captioned proceeding. In the *Order*, the Commission created new requirements for certain broadcasters, multi-channel video program distributors ("MVPDs"), broadcast networks, and nonbroadcast networks to provide audio descriptions of the video content of portions of their prime time or children's programming. The entities covered by the new rules are required to distribute these audio descriptions, which the Commission believes would benefit persons with visual disabilities, through the Second Audio Program ("SAP") channel that is part of the video/audio program transmission stream.

In the *Order*, the Commission recognized that certain networks, including HBO, currently provide extensive Spanish language audio using the SAP channel. The Commission acknowledged that it is not technically possible to offer both Spanish language audio and video

<sup>1/</sup> 47 C.F.R. § 1.429. HBO is an "interested person" within the meaning of the rules, having participated in this proceeding and being a party affected by the new regulations.

<sup>2/</sup> Implementation of Video Description of Video Programming, *Report and Order*, MM Docket No. 99-939, FCC 00-258, 65 Fed. Reg. 54805 (Sept. 11, 2000) ("*Video Description Order*").

description services simultaneously using the SAP channel. The Commission concluded that disruption of the Spanish language services would be avoided because those networks with substantial Spanish language audio, including HBO, would not be covered by the new rules.

Despite this clear expression of Commission intent, the rules accompanying the *Order* unfortunately included HBO within their scope. Because the Commission clearly did not intend to affect adversely the provision of Spanish audio services by HBO, and because Spanish language audio serves an important public interest, HBO respectfully requests that the Commission clarify or partially reconsider its *Video Description Order* to correct this apparent error in the rules. Specifically, HBO requests that the Commission clarify or revise the rules so that they (1) apply only to the top five national *non-premium*, nonbroadcast networks, (2) apply only to the top five non-premium, nonbroadcast networks that reach 50 percent of MPVD households, or (3) exempt from the video description requirement those networks that currently distribute significant amounts of Spanish language audio using the SAP channel.

**I. The Commission Intended to Limit the Applicability of the Rules and to Avoid Adverse Effects on Services with Significant Spanish Language Audio.**

It is evident from the record in this proceeding that the Commission never intended to include HBO within the scope of the video description rules. In the *Notice of Proposed Rulemaking*, the Commission proposed that the larger MVPDs “provide programming with video description on nonbroadcast networks that reach 50 percent or more MVPD households.”<sup>3/</sup> HBO was not encompassed within the scope of that proposal because the HBO service does not reach 50 percent of MVPD households. In an effort to respond to the concerns raised in the comments

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<sup>3/</sup> Implementation of Video Description of Video Programming, *Notice of Proposed Rulemaking*, MM Docket No. 99-939, 14 FCC Rcd 19845, 19854-55, ¶ 24 (1999); *Video Description Order*, ¶ 24.

regarding the burdens of the video description requirement, in the *Order*, the Commission “decided to limit” the number of nonbroadcast networks to which the rules would apply. Thus, instead of the 50 percent MVPD household standard, which would have encompassed about 40 nonbroadcast networks (but not HBO), the Commission decided instead to begin by applying the video description rules to only five national nonbroadcast networks. But this revision was effectuated by framing the requirement in terms not of audience reach, but audience share.<sup>4/</sup> There is absolutely no indication that, through the *Order*, the Commission intended to *expand* the scope of the rule to cover networks that would not have been subject to the rules as originally proposed in the *Notice of Proposed Rulemaking*.

Other portions of the *Order* reflect a specific Commission intent not to apply the video description rules to HBO. During the proceedings, HBO, supported by others, raised the concern that the video description requirement would conflict with extensive Spanish language audio offered on the HBO network feeds.<sup>5/</sup> The Commission recognized the potential for conflict between the two uses, but resolved the issue by concluding that “[t]hose few networks that provide more extensive Spanish language audio are not among the networks that will be affected by our rules.”<sup>6/</sup>

Despite these clear statements of Commission intent not to expand the coverage of its rules and specifically to exclude HBO and other networks with significant Spanish language

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<sup>4/</sup> *Video Description Order*, ¶ 25, App. B, § 79.3(b)(3)( “top five national nonbroadcast networks as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc. for the time period October 1999 - September 2000.”).

<sup>5/</sup> See generally HBO Comments; LULAC Comments.

<sup>6/</sup> *Video Description Order*, ¶ 34. In the footnote to this statement, the Commission stated: “Approximately 85 percent of the programming of HBO, the Movie Channel, and Showtime, and 50 percent of the programming of Encore, contain Spanish audio. We do not expect these networks to be among the top five nonbroadcast networks subject to our rules.” *Id.* n.103 (internal citations omitted).

audio, the rule, as it currently is written, requires HBO to provide video description. The rule applies to the “top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999-September 2000.”<sup>7/</sup> As reflected in Exhibit A, attached hereto, under this definition, HBO ranks second in prime time audience share.<sup>8/</sup> This obvious Commission mistake will be a significant problem for HBO because it will force HBO to delete Spanish language audio from one hundred or more motion pictures or other programs per year in HBO’s prime time schedule and replace the Spanish language audio in that programming with video descriptions.

The result would be to deprive HBO's substantial Spanish speaking subscriber community of access to Spanish language programming and to diminish HBO’s ability to fulfill its subscribers’ needs and expectations. It could also result in the loss of those HBO subscribers who place a high value on HBO’s Spanish language audio.<sup>9/</sup>

## **II. Use of SAP for HBO’s Spanish Language Audio Must Not be Interrupted.**

### **A. Use of SAP for Spanish Language Audio is a Valuable Cultural Resource.**

More than 17 million people in the United States speak Spanish at home.<sup>10/</sup> The Spanish audio track of broadcast programming and cable programming networks provides the Hispanic

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<sup>7/</sup> *Video Description Order* at App. B, § 79.3(b).

<sup>8/</sup> See Exhibit A. HBO has been ranked the second nonbroadcast network in terms of prime time audience share for the past several years.

<sup>9/</sup> Advertiser supported networks may well be able to commercially benefit from video description by selling video description “sponsorships” similar to closed captioning sponsorships that are commonplace today. HBO would not have this opportunity, since its programming is free of commercials.

<sup>10/</sup> U.S. Dep’t of Commerce, Economics & Statistics Admin., Bureau of the Census, 1990 U.S. Census, Table 4: “Languages Spoken by Persons 5 Years and Over” (1991).

community with important educational and entertainment benefits.<sup>11/</sup> Where available, use of the Spanish audio track is widespread, driven by the demand of the Spanish-speaking community.<sup>12/</sup>

HBO has been at the forefront of providing programming in Spanish. Since 1989, HBO has provided Spanish language audio for distribution on SAP channels, in a service that is now called *HBO En Espanol*. *HBO En Espanol* is available to an estimated six million Spanish speaking HBO households. To serve this large audience, HBO transmits nearly all of the HBO main programming feed with Spanish language audio. In 1999, for example, an average of 93 percent of prime time hours on HBO aired in Spanish language, and an average of 85 percent of full day hours aired in Spanish. Through August of this year, the amount of Spanish language programming has increased to 94 percent in prime time and 87 percent for the full day. HBO has made a strong commitment to the Hispanic community and believes it should be permitted to continue serving its Spanish language viewers without compromising their service by diverting the use of SAP channels to video description.

**B. Video Description is Incompatible with Extensive Spanish Language Usage of SAP.**

The SAP channel is capable of carrying only one audio “stream” per television channel.<sup>13/</sup> This technical limitation forces a situation where “video description ... compete[s]

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<sup>11/</sup> LULAC Comments at 2-3. LULAC points out the cultural benefits of Spanish language audio by noting that “[w]hile many people who speak Spanish in the home also speak English, they may prefer to watch television with Spanish audio for a variety of reasons. For example, Spanish audio may be preferred if the television topic is technical or medical, i.e., has a special vocabulary. Spanish audio can provide a better understanding of the nuances of plot or comedy, and gives a different perspective such as in news coverage. Sometimes Spanish audio is more consistent with the flavor of the program itself, such as soccer.” *Id.* at 3.

<sup>12/</sup> LULAC Comments at 3.

<sup>13/</sup> Motion Picture Association of America, Inc. Comments at iv, 22; National Cable Television Association Comments at 11-14.

with an alternate language for use of the SAP channel.”<sup>14/</sup> The Commission noted, “there is not a technical solution to allow two uses of the SAP channel simultaneously.”<sup>15/</sup> Although some program networks, which do not use SAP channels extensively for Spanish language audio, may be able to “rotate” the SAP use between Spanish language and video description, that is not an option for distributors of HBO. HBO’s Spanish speaking subscribers expect, night after night, to have virtually the entire HBO prime time schedule available in their native language. To suddenly disrupt these expectations by substituting video description for Spanish language would be a severe disservice to this important constituency. In addition, if video description were required, there would be constant confusion both among the Spanish speaking audience and the visually disabled audience as to when programming with Spanish audio or video description was available.

### **III. Proposed Clarification or Modifications.**

Based on the foregoing, HBO submits that the Commission should clarify or reconsider the *Order* to correct a situation that the Commission obviously did not intend. In view of the Commission’s statements in the *Notice of Proposed Rulemaking* and in the *Order*, it appears that the Commission must have intended the rules to apply to basic nonbroadcast networks. If this is the case, the Commission can correct the matter simply by changing the definition of nonbroadcast networks covered by the rule to be “one of the top five national *non-premium* nonbroadcast networks, as defined by an average of the national audience share during prime time as determined by Nielsen Media Research, Inc. for the time period October 1999 - September 2000.” Another solution would be to combine the “50 percent of MVPD household”

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<sup>14/</sup> WGBH Comments at 18.

<sup>15/</sup> *Video Description Order*, ¶ 34.

test articulated in the *Notice of Proposed Rulemaking* with the top five nonbroadcast networks standard of the *Order*. The result would define the nonbroadcast networks covered as “those national nonbroadcast networks, which reach 50 percent or more of MVPD households and which are ranked in the top five, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc. for the time period October 1999 - September 2000.”

Yet another solution would be simply to exempt from the rules those networks that currently transmit a high percentage (such as 65 percent or more) of their prime time schedules with Spanish language audio using the SAP channel.

Neither the proposed clarification or the potential modifications undercuts the intentions of the *Order*. Rather, all of the proposed modifications are consistent with the Commission’s clearly expressed intentions and serve the public interest by preserving Spanish language audio.<sup>16/</sup>

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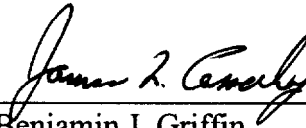
<sup>16/</sup> The proposed clarification or modifications would not appear to affect any other nonbroadcast networks. As reflected in Exhibit A, three nonbroadcast networks have the same prime-time audience share, and so with HBO in the list, there is a three-way tie for fourth place, among Nickelodean, TNT, and Lifetime, each with a 2.2 prime time share. If HBO were removed from the list through the clarification or modifications discussed above, the result would be a three-way tie for third place, again including the same three networks that are already subject to the rules.

## CONCLUSION

For the forgoing reasons, HBO respectfully requests a clarification or partial reconsideration of the *Video Description Order* in the manner described herein.

Respectfully submitted,

**HOME BOX OFFICE, a Division of  
Time Warner Entertainment Company, L.P.**



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Benjamin J. Griffin

James L. Casserly

**MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, P.C.**

701 Pennsylvania Avenue, N.W., Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Its Attorneys

October 11, 2000



## **EXHIBIT A**

### **NIELSEN TV NATIONAL PEOPLE METER**

10/01/1999-09/30/2000

TOTAL-10/01/1999

VIEWING SOURCES	DAYPARTS	HHLD AA(000)	HHLD US AA%	HHLD US SH	HHLD US HUT/PUT
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10/01/1999-09/30/2000

TOTAL-10/01/1999

VIEWING SOURCES	DAYPARTS	HHLD AA(000)	HHLD US AA%	HHLD US SH	HHLD US HUT/PUT
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(USA)	MTWTFSS 8:00PM-11:00PM	1702	1.7	2.9	58.7
(HBO)	MTWTFSS 8:00PM-11:00PM	1607	1.6	2.7	58.7
(TBS)	MTWTFSS 8:00PM-11:00PM	1511	1.5	2.6	58.7
(NICK)	MTWTFSS 8:00PM-11:00PM	1348	1.3	2.2	58.7
(TNT)	MTWTFSS 8:00PM-11:00PM	1316	1.3	2.2	58.7
(LIF)	MTWTFSS 8:00PM-11:00PM	1303	1.3	2.2	58.7
(ESPN)	MTWTFSS 8:00PM-11:00PM	1221	1.2	2	58.7
(AEN)	MTWTFSS 8:00PM-11:00PM	1077	1.1	1.9	58.7
(DSNY)	MTWTFSS 8:00PM-11:00PM	944	0.9	1.5	58.7
(DISC)	MTWTFSS 8:00PM-11:00PM	933	0.9	1.5	58.7
(MTV)	MTWTFSS 8:00PM-11:00PM	658	0.7	1.2	58.7
(FAM)	MTWTFSS 8:00PM-11:00PM	607	0.6	1	58.7
(MAX)	MTWTFSS 8:00PM-11:00PM	546	0.5	0.9	58.7
(TNN)	MTWTFSS 8:00PM-11:00PM	541	0.5	0.9	58.7
(SCIFI)	MTWTFSS 8:00PM-11:00PM	540	0.5	0.9	58.7
(CNN)	MTWTFSS 8:00PM-11:00PM	503	0.5	0.9	58.7
(SHOW)	MTWTFSS 8:00PM-11:00PM	458	0.5	0.9	58.7
(CMDY)	MTWTFSS 8:00PM-11:00PM	419	0.4	0.7	58.7
(FX)	MTWTFSS 8:00PM-11:00PM	356	0.4	0.7	58.7
(VH1)	MTWTFSS 8:00PM-11:00PM	329	0.3	0.5	58.7
(BET)	MTWTFSS 8:00PM-11:00PM	295	0.3	0.5	58.7

### CERTIFICATE OF SERVICE

The undersigned, Jette Ward, a secretary with the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. hereby certifies that this 11th day of October, 2000, I have caused a true and correct copy of the foregoing **Petition for Clarification or Partial Reconsideration of Home Box Office** to be served via hand delivery:

Susan Fox, Esquire  
Deputy Chief  
Mass Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Eric Bash, Esquire  
Attorney Advisor  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

David Goodfriend, Esquire  
Legal Advisor  
Commissioner Ness' Office  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Helgi C. Walker, Esquire  
Senior Legal Advisor  
Commissioner Furchtgott-Roth's Office  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Mary Beth Murphy, Esquire  
Chief, Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Clint Odom, Esquire  
Legal Advisor  
Chairman Kennard's Office  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Jay Friedman, Esquire  
Legal Advisor  
Commissioner Tristani's Office  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Susan Eid, Esquire  
Legal Advisor  
Commissioner Powell's Office  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

  
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Jette Ward